

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

75-6105

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

BATTERY STEAMSHIP CORP.,

Plaintiff-Appellant,

against

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL BY BATTERY STEAMSHIP CORP. FROM A DECISION
OF THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR PLAINTIFF-APPELLANT
BATTERY STEAMSHIP CORP.**

DOUGHERTY, RYAN, MAHONEY, PELLEGRINO
& GIUFFRA

Attorneys for Battery Steamship Corp.

Plaintiff-Appellant

576 Fifth Avenue

New York, New York

(212) 765-1100

ROBERT J. GIUFFRA,
Of Counsel.

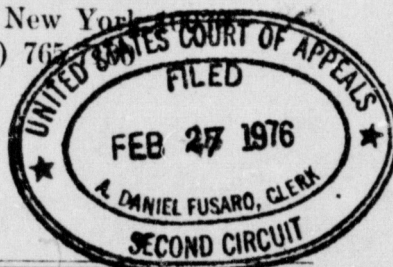




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BRIEF FOR PLAINTIFF-APPELLANT BATTERY STEAMSHIP CORP.

Jurisdiction

This brief is submitted by plaintiff-appellant, Battery Steamship Corp. (hereinafter referred to as "Battery"), in support of its appeal after trial from the judgment and order of the Honorable Charles M. Metzner, United States District Court for the Southern District of New York dismissing the plaintiff's complaint (45a-46a).

The Court below dismissed the action filed by Battery to recover damages sustained to the SS "ELWELL" during fuel loading operations which were conducted in Colon

Bay, Republic of Panama on June 25, 1967, on the basis that the defendant-appellee, United States of America (hereinafter referred to as "United States") was not responsible for the acts of Refineria Panama, S.A. (hereinafter referred to as "Refineria"), who had been engaged by the United States to fuel the SS "ELWELL".

The opinion of Judge Metzner was dated August 22, 1975 and amended on September 8, 1975. Judgment was entered by the Court on September 11, 1975 (41a-46a).

Battery filed a Notice of Appeal on October 8, 1975. The Record on Appeal was transferred to the United States Court of Appeal for the Second Circuit on December 2, 1975. The jurisdiction of this Court rests on 28 U.S.C. § 1291.

The Court below had previously dismissed the complaint on a motion for summary judgment filed on behalf of the United States. The dismissal was reversed and the litigation remanded for trial by the Court of Appeals in an opinion reported at 513 F.2d 735 (2nd Cir. 1975). The instant opinion by Judge Metzner is not officially reported but appears at 1975 AMC 1759 (41a-44a).

Statement of the Case

This action was filed in the United States District Court for the Southern District of New York by plaintiff-appellant, Battery to recover damages sustained to the SS "ELWELL" on June 25, 1967, in Colon Bay, Republic of Panama. The vessel at the time was in the process of being fueled from a tank barge.

The original complaint, filed on behalf of Battery on June 24, 1969, named the United States as sole defendant. Thereafter, on August 25, 1971, an amended complaint was filed on behalf of Battery which named Refineria and the United States as co-defendants. The complaint against

Refineria was dismissed by Judge Lasker of the United States District Court for the Southern District of New York on December 8, 1972, on the ground that the action was time-barred. No appeal from the decision of Judge Lasker was filed by Battery.

An answer to the amended complaint was filed by the United States on or about April 6, 1972. Interrogatories were served by Battery upon the United States and answered. A deposition of the United States was conducted by Battery. Subsequent to the remand by the Court of Appeals additional testimony was obtained by Battery. This included testimony of Chief Mate Edward N. Lilly and Messrs. Klyver and Cederholm, employees of Battery who were involved with the question of whether there was a waiver of the claim by Battery.

The deposition of these witnesses was submitted to Judge Metzner for his consideration (Original Record on Appeal, Documents Nos. 38, 40 and 41). The trial before Judge Metzner consisted of the submission of the depositions previously referred to and a discussion of the applicable law (Original Record on Appeal, Document No. 37).

Counsel also submitted to the trial Court an agreed statement of facts with exhibits (4a-6a).

On August 22, 1975, the District Court filed its opinion dismissing the complaint against the United States. The opinion was amended on September 8, 1975 (41a-44a). A Notice of Appeal was filed on October 8, 1975. The Record of Appeal was transferred to the United States Court of Appeals for the Second Circuit on December 2, 1975.

Issue Presented for Review

Whether the United States is responsible either in contract or tort for the misfeasance of Refineria in the fueling operation of the SS "ELWELL" on June 25, 1967?

Summary of Argument

Battery respectfully contends that the conclusion by the trial Court that the United States was not responsible for the acts of Refineria was clearly erroneous as a matter of law.

It is further contended that once the United States undertook the responsibility to fuel the SS "ELWELL" by employing a third-party to perform the obligation, the United States became responsible for any breach by the third-party in the performance.

The United States, moreover, recognized that it would be responsible in damages for the improper method and manner utilized to fuel the SS "ELWELL" by a third-party nominated to carry out its agreement under the charter party.

Statement of Facts

On March 27, 1967, a time-charter agreement was entered into between the United States' agents, Military Sea Transport Service (MSTS) and Battery, for the use of the SS "ELWELL", a vessel owned by Battery for a period of a minimum of twelve (12) months to about fifteen (15) months (7a-37a).

During the charter period, the vessel was directed by MSTS to proceed to Cristobal to load fuel oil for the voyage to the Far East. The vessel was shifted from Cristobal pursuant to the directions of MSTS to Colon Bay, Republic of Panama (Original Record on Appeal, Document No. 38, pp. 7-8).

While the fuel was being loaded, the SS "ELWELL" was repeatedly struck by the Oilbar No. 4, a vessel owned by Refineria, which resulted in extensive damage to the SS "ELWELL" in the sum of \$46,595.51 (4a).

MSTS was notified on June 25, 1967 of the collision. Subsequent to the collision, the charter party was amended (5a and 36a). The Amendment related to the redelivery of the SS "ELWELL" prior to the termination date called for in the charter party. The Amendment to the charter party formed the basis of the United States' motion for summary judgment. Judge Metzner at that time found that the Amendment precluded any claim by Battery against the Government. On appeal, this determination was reversed by the Second Circuit Court of Appeals (513 F. 2d 735).

Upon re-trial, Judge Metzner held that the claim was not waived by Battery. The trial Court, nevertheless, dismissed the complaint on the ground that the United States was not liable for any damage sustained to the vessel caused by the negligence on the part of the Oilbar No. 4, either under the contract theory of absolute liability or a tort theory of *respondeat superior* (42a).

Prior to trial before Judge Metzner, counsel for both parties executed an agreed statement of facts wherein the United States conceded that during the fueling operation, the Oilbar No. 4 repeatedly struck and damaged the port side of the SS "ELWELL". Moreover, that MSTS arranged for, ordered and paid for the fuel supplied by Refineria, a private corporate entity not owned or operated by the United States (4a).

The agreed statement of facts additionally contained a stipulation concerning the proposed testimony by the contract administrator for MSTS. It would have been the contract administrator's opinion that the United States would not be responsible for any damages sustained to the vessel caused by the *negligence* of Refineria. This witness would, moreover, testify that Articles 8 and 16 of the charter party were non-negotiable (5a-6a).

On the other hand, Messrs. Klyver and Cederholm, Battery's witnesses, if called, would testify that in their

opinion the United States was responsible for the damages sustained during the fueling operation carried out by Refineria (6a).

Chief Mate Lilly testified about the circumstances of how the damages occurred and confirmed the extent that the United States controlled the operations of the vessel to include the fueling of the SS "ELWELL" (Original Record on Appeal, Document No. 38, pp. 8 and 9).

Under Article 16 of the charter party, the fueling clause, the United States agreed to supply fuel to the SS "ELWELL" under certain circumstances (12a). Subdivision (c) of Article 16, which is relevant to this case, provided that the charterer (United States) may "supply or *cause* to be supplied all fuel required" by the SS "ELWELL" during the charter period (12a).

The evidence confirmed that the United States made all of the arrangements to supply the fuel; to direct the SS "ELWELL" to proceed to Cristobal pursuant to their directive; and, upon arrival, ordered the shifting of the vessel to Colon Bay, the fueling area. It is unquestioned that the oil barge was utilized by the United States to fuel the SS "ELWELL" under Article 16, Subdivision (c) of the charter party.

The United States acknowledged liability for the striking damage to the SS "ELWELL" as the United States did not assert any defense to the claim (4a).

Judge Metzner recognized the United States liability for the striking but determined that the charter party exonerated the United States for the acts of Refineria either under the contract theory of absolute liability or the tort theory of liability (42a).

POINT I

The trial Court erroneously concluded that the United States was not responsible for breach of contract under the terms of the charter party.

The evidence presented to the trial Court confirmed that the United States had hired Refineria to perform its obligation to refuel the SS "ELWELL" on June 25, 1967, pursuant to its option under Article 16 Subdivision (c) of the charter party. This fact is undisputed.

The additional undisputed facts revealed that the damage to the vessel could have been avoided if the tugs which had assisted in the tying up of the Oilbar No. 4 had remained in the area during the entire fueling operation. In this regard, the proof shows that the tugs were tied up to the SS "ELWELL" until about 1600 hours. It was only after the departure of the tugs did the barge repeatedly strike the portside of the vessel.

It was evident that if the tugs had remained alongside the SS "ELWELL", they would have prevented the barge from striking the SS "ELWELL". Moreover, the extensive damage to the SS "ELWELL" could have been prevented if the barge had cast off when it became obvious that the SS "ELWELL" was being damaged (Original Record on Appeal, Document No. 38—Testimony of Chief Mate Lilly).

The Master and Chief Mate requested the barge to stop the fueling because of the striking and it was only after the Chief Mate Lilly threatened to sever the barge lines did the barge in fact stop the fueling.

No specific finding was made by the trial Court regarding Refineria's status for the breach of contract in the operation except, a finding, that under Articles 8 and 16 of the charter party, the United States was not liable for property damage caused by a third party over which the United States had no control or supervision.

It is respectfully submitted that this finding by the trial Court was erroneous as a matter of law. Article 16 of the charter party provided for two alternatives for fueling of the SS "ELWELL" if the United States exercised the option under the charter party. The United States evidently did not have available either its own tank barge or fuel and, therefore, engaged Refineria to perform the alternate commitment under the charter party.

The factual evidence supports the conclusion that the United States had control over the operation. This included the evidence that MSTs' representative monitored the movements of the SS "ELWELL" to the anchorage in Cristobal and directed that the SS "ELWELL" be shifted to the anchorage in Colon Bay, Republic of Panama, where the barge was to load the fuel.

Regardless of the provisions of either Article 8 or Article 16 of the charter party, which were concededly non-negotiable, and, therefore, not subject to amendment at the behest of Battery, the United States once it exercised the option to fuel the SS "ELWELL", was under the duty and obligation to perform the services or have the services performed in a workmanlike manner.

The uncontroverted evidence supports Battery's allegations, that the performance by Refineria did not measure up to the minimum standard to be expected. The United States by delegating or assigning to another the obligation to perform the fueling of the vessel, could not insulate itself from any claim for damage to the SS "ELWELL", which might arise because of an improper performance of the obligation by the third-party.

The question of liability in the performance of a maritime service contract was recently discussed and considered at length by the Second Circuit Court of Appeals in *Fairmont Ship. Corp. v. Chevron International Oil Co., Inc.*, 511 F.2d 1252 (2nd Cir. 1975), *cer. denied*. The Court of Appeals in an opinion by Judge Smith stated that the

obligation of a workmanlike performance applied to a maritime service contract and bound both the contracting party or anyone delegated the responsibility by the contracting party.

The Court described the obligation as follows on page 1259:

"This case involves only the much simpler issue of whether Chevron's contract to provide tug assistance imposed on Chevron an obligation to perform in a workmanlike manner. We perceive that as a simpler issue because in our view *Ryan*, by necessary implication, confirmed the applicability to maritime service contracts of the hornbook rule of contract law that one who contracts to provide services impliedly agrees to perform in a diligent and workmanlike manner. 9 S. Williston, Contracts § 1012C, at 38-39 (3d ed. Jaeger 1967). This obligation has been implied in contracts ranging from an ordinary construction contract, *Henggeler v. Jindra*, 191 Neb. 317, 214 N.W.2d 925 (1974), to a contract to install plumbing, *In re Estate of Talbott*, 184 Kan. 501, 337 P.2d 986 (1959), to a contract to tan goat skins, *William Beadenkopf Co. v. Henwood & Nowak, Inc.*, 14 F.2d 125 (D.Mass.1926), and there is no reason why it should not be implied in maritime service contracts as well. Accordingly, we hold that there should be implied in Chevron's contract to provide tug assistance an obligation to perform in a workmanlike manner—that is, a warranty of workmanlike performance."

The Court of Appeals recognized that this duty and responsibility to properly perform extended and was owed to a plaintiff by the subcontractor or agent of the contracting party. *Todd Shipyard Corp. v. Moran Towing & Transportation, Inc.*, 247 F.2d 626 (2nd Cir. 1957); *Mid-America Transportation Co., Inc. v. Rosebarger Line, Inc.*,

477 F.2d 915 (8th Cir. 1973); *Smith v. Booth*, 122 F. 626 (2nd Cir. 1903).

The Court below summarily dismissed the application of these rulings by a finding that the agreement by the United States to pay for the necessary fuel, did not include the furnishing of the fuel similar to the contracting parties' obligation in *Fairmont*, *supra* (43a).

An analysis of the proof in *Fairmont*, *supra*, indicated that the defendant (Chevron) besides agreeing to supply bunkers to the SS "WESTERN EAGLE" had also agreed to provide tug assistance. The evidence further established that tugs failed to properly secure the SS "WESTERN EAGLE", as a result of which, the vessel was damaged. Chevron did not have tugs available to perform and therefore contracted with a third party to provide the tugs. Both the lower Court and the Court of Appeals, in adopting the theory of performing in a workmanlike manner, implicit in the maritime service contract, found that the defendant, Chevron, was liable because of the breach of warranty of workmanlike performance by Chevron's agent or subcontractor.

The decision in *Fairmont*, *supra*, was clearly applicable to the present litigation. In this case, the United States delegated the function of fueling the SS "ELWELL" to a third party, and as the venture was not performed in a workmanlike manner, Battery is entitled to recover damages for the breach. It is obvious that the fueling of the SS "ELWELL" at anchorage, would require the employment of an oil barge and a tug or tugs in order to secure the barge alongside the SS "ELWELL". At the same time, there was a requirement that throughout this undertaking the services would be performed in a proper manner. A breach of the obligation entitled Battery to recover damages.

If this reasonable interpretation was not accepted, a party to a contract, would be in a position to deny both

its responsibility and liability by delegating the performance of the contract to a third party over which one of the contracting parties, had no contractual agreement or control.

The fact remains, that Battery did not negotiate a contract for the fueling of the SS "ELWELL" either directly or indirectly with Refineria. Battery's contract was with the United States, who in the exercise of its option under the charter party, arranged for the fueling of the vessel by its agent or subcontractor. Any failure of the United States' agent or subcontractor to perform in a workmanlike manner implicates the United States for the damages sustained to the vessel.

Battery was not required to pursue an action for recovery of the damages against Refineria because Battery's contract was with the United States who had assumed the obligation to perform properly and this obligation extended even to a situation where the United States delegated the responsibility to a third party.

The only reason for precluding Battery's recovery against the United States would be the introduction of some evidence showing that Battery actively interfered with the fueling operation. No evidence was submitted by the United States that Battery in any way interfered with the services being performed by Refineria. *Compagnie Generale Transatlantique v. United States*, 522 F.2d 148 (2nd Cir. 1975).

A breach of the warranty of workmanlike performance may occur without the negligence on the part of the maritime service contractor on the theory adopted by the Supreme Court, that liability for the loss or damage should fall upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury. No doubt if the United States had acted in this manner, the damage to the SS "ELWELL" would have been averted. *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 373 U.S. 315 (1964).

The United States was in the position to minimize the loss if it undertook to supervise or regulate Refineria's performance to assure that a workmanlike manner was selected in the fueling of the vessel.

The interpretation by Judge Metzner of Article 16 of the charter party would even permit the United States to disclaim liability for property damage even in those situations where the SS "ELWELL" was fueled by a barge owned by the United States or at a facility owned by the United States (42a-45a).

An interpretation so limiting is in itself invalid on its face as well as being invalid on the facts developed during trial. Article 16, moreover, which was non-negotiable, prevented Battery from negotiating with the United States responsibility for a contingency, when work involving the vessel, was performed by an agent or subcontractor of the United States.

In any event, the United States is not precluded, even as of this date from seeking indemnification from Refineria for any damages recovered by Battery. In fact, a separate action against Refineria has been filed in the United States District Court for the Southern District of New York. The litigation has been placed on the suspense calendar pending outcome of this appeal.

POINT II

The trial Court conclusion that Refineria was not an agent or subcontractor of the United States was clearly erroneous.

Article 16, subdivision (c) of the charter party was as follows:

"The Charterer may supply or *cause* to be supplied any or all of the fuel required by the Vessel during the period of the charter. The grade of such fuel is

to be as specified by the Owner, or be subject to the Owner's approval and acceptance. If the Owner loads such fuel on the Vessel at his own expense, the Charterer shall reimburse the Owner reasonable cost of such loading."

If the oil barge which had been used was owned by the United States, there is no question regardless of subdivision (g) of Article 16, that the United States would be responsible for the damages.

What we are concerned with at this junction is the meaning of the clause in subdivision (c), namely, ". . . cause to be supplied any or all of the fuel . . .".

Webster's Dictionary defines "cause" as including the meanings: "something that occasions or effects a result," "a person or thing that is the occasion of an action or state," and "esp: an agent that brings something about."

Black's Law Dictionary defines "cause" as including the meanings: "to bring about," "to bring into existence," and "to effect as an agent."

Within the context of the relationship between Battery and the United States for the use of the vessel and the definition of the word "cause", it was apparent that the United States under Article 16 either was the party to perform the fueling or it would employ another to act for it.

By legal definition an agent is a party who is employed to act for another. *Restatement (Second) of Agency* § 1.

It is unquestioned that Refineria was acting in such a capacity on behalf of the United States in that Refineria was utilized by the United States to perform its obligation under the charter party. Any other interpretation would be inconsistent with the relationship of all the parties to the venture. *Restatement (Second) of Agency* § 214 and 251.

There was no evidence even suggesting that Battery was aware of the relationship between Refineria and the United States before the collision. The proof demonstrated that when the damages arose all of Battery's dealings and communications were with MSTS and it was only sometime later, once the litigation was pursued, did Refineria become involved with the claim. Battery dealt with the United States and was entitled to recover from the United States for the damages to the vessel caused by the United States' agent.

The United States even though not described as a demise charterer of the SS "ELWELL", did in fact exercise complete control over the operation and movements of the vessel. At no time were there any contacts or contracts between Refineria and Battery.

The fact that the United States delegated the duty to fuel the vessel did not insulate the United States from liability for the damages. *Fairmont*, supra.

The trial Court additionally determined that Refineria was an independent contractor and that the United States was therefore not responsible for the negligent acts of Refineria. It is respectfully submitted that this conclusion is erroneous as a matter of law.

This Court in *Tropea v. Shell Oil Co.*, 307 F.2d 757 (2nd Cir. 1962), which was cited by the trial Court in support of its determination, reviewed the general rule concerning a general contractors liability. This Court decided that a party who hires an independent contractor, is not liable for the negligent acts of the independent contractor. However, while accepting this general rule relied upon by the trial Court, this Court recognized that a general contractor (MSTS) would still be responsible for the acts of his contractor, when the general contractor assumed a contractual obligation to perform the services. The United States was in such a position when it exercised the option under the charter party.

Aside from this proposition, a general contractor (MSTS) would still be responsible for the acts of the subcontractor, when the acts of the subcontractor effects the results which the general contractor was under duty to achieve. The duty which MSTS attempted to achieve was to fuel the SS "ELWELL", without inflicting any hull damage to the vessel or injury to the vessel's crewmembers. There was a breach of this duty when Refineria rendered a substandard performance. The United States could or should have known from the nature of the work being performed, that an accident or damage could occur if the operation was not done properly. Under the circumstances, the general contractor (MSTS) would be liable for the action of its subcontractor.

We have previously discussed in Point I of this presentation, the question concerning the contractual liability of the United States to either perform or have performed the fueling of the vessel in a workmanlike manner and the aforesaid discussion is adopted in full under this point. See also *Restatement of Law (Torts)*, § 413. *Fairmont*, *supra*; *Todd Shipyard*, *supra*.

The duty of the United States to exercise reasonable care was non-delegable in a sense that the United States could not insulate itself for the negligent acts of the third-party because by its contract with Battery it agreed to properly fuel the vessel. *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, *supra*.

CONCLUSION

The decision of the Court below should be reversed and judgment entered in favor of Battery for the damages sustained.

Dated: New York, New York, February 17, 1976.

Respectfully submitted,

DOUGHERTY, RYAN, MAHONEY,
PELLEGRINO & GIUFFRA
Attorneys for Battery
Steamship Corp.
Plaintiff-Appellant
576 Fifth Avenue
New York, New York 10036
(212) 765-7100

ROBERT J. GIUFFRA
Of Counsel

UNITED STATES COURT OF APPEALS
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**AFFIDAVIT
OF SERVICE**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Juan Delgado, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 596 Riverside Drive, New York, New York. That on February 27, 1976, he served 2 copies of Brief for Plaintiff-Appellant Battery Steamship Corp., on

THOMAS J. CAHILL, Esq.,
United States Attorney,
GILBERT S. FLEISCHER, Esq.,
Attorney in Charge
Admiralty & Shipping Section
Department of Justice
26 Federal Plaza,
New York, New York 10007

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Sworn to before me this
27th day of February, 1976

Juan Delgado

John V. D'Esposito
JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977